

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	No. 04-20017-DV
)	
RANDE LAZAR, M.D., d/b/a)	
OTOLARYNGOLOGY)	
CONSULTANTS OF MEMPHIS,)	
Defendants.)	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS FOR
PREJUDICIAL PRE-INDICTMENT DELAY

An indictment was returned by the grand jury on January 20, 2004 charging the defendant, Rande H. Lazar ("Lazar"), M.D. d/b/a Otolaryngology Consultants of Memphis, with devising and executing a scheme to defraud and obtain money from health care benefit programs. The indictment charges that Lazar falsified or caused to be falsified medical reports to justify billing and billed for procedures that were not performed by him, were not necessary, or were not performed at all.

Before the court is the motion of Lazar, filed August 27, 2004, to dismiss the indictment for prejudicial pre-indictment delay. This motion was referred to the United States Magistrate Judge for determination. For the reasons that follow, the motion is denied.

Whether pre-indictment delay by the government amounts to an unconstitutional deprivation of rights depends on the circumstances of each case. *United States v. Lovasco*, 431 U.S. 783 (1977). The applicable statute of limitations provides "the primary guarantee, against bringing overly stale charges" and thus places limits on prosecutorial delay. *United States v. Ewell*, 383 U.S. 116 (1966). Accordingly, "the acceptability of a pre-indictment delay is generally measured by the applicable statute of limitations." *United States v. Atisha*, 804 F.2d 920, 928 (6th Cir. 1986).

In addition, pre-indictment delay is subject to the due process mandates of the Fifth Amendment. *Lovasco*, 431 U.S. at 789-90 (1977). Pre-indictment delay violates a defendant's right of due process when the defendant can demonstrate that (1) he suffered substantial prejudice to his right to a fair trial as a result of the delay; and (2) the government purposely delayed to gain a tactical advantage over the defendant. *Id.* Delay resulting from mere investigative efforts however "does not deprive [a defendant] of due process, even if his defense may have been somewhat prejudiced by the lapse of time." *Id.* at 796.

To establish a case of pre-indictment delay, Lazar points out that the government had been on notice of the allegations as early as June 20, 2000, yet it took over three and one-half (3½) years before they filed an indictment against him. The statute of

limitations for all 115 counts set forth in the indictment which fall under 18 U.S.C. § 1347 is five years. Therefore, the government was well within the statute of limitations in filing the indictment.

Lazar argues that the delay occurring between October of 2001 and the subsequent indictment in January of 2004 caused substantial actual prejudice to his ability to maintain a proper defense. To establish substantial prejudice, Lazar contends that insurance records and records from Access-Med Plus that were critical to his defense were destroyed. Lazar also contends that witnesses' memories have been affected and that "known destruction of records" would make it impossible to refresh the witnesses' memories.

Though Lazar claims that records critical to his defense have been destroyed, he provides no specific reference to any evidence that was lost. Lazar's position is thus based on the conclusory assumption that the evidence allegedly destroyed was crucial to his case. The court can find no substantial prejudice to Lazar's case in the absence of a specific showing of what documents were lost and how they were relevant to his defense.

Furthermore, Lazar provides insufficient evidence to prove that the government intentionally delayed the indictment to gain a tactical advantage. Lazar argues that the government intentionally delayed the indictment in order to further develop evidence for a

qui tam civil case. The government maintains that any delays were approved by both parties as the parties entered into numerous waivers of the statute of limitations. It appears to the court that if Lazar had been concerned about an intentional delay in order gain a tactical advantage, then Lazar would not have agreed to waive the statute of limitations. Instead, Lazar would have forced the government to proceed with its case sooner.

Lazar has not shown that the delay in the indictment caused substantial prejudice to his case, nor has he shown that the government's delay was intentionally designed to gain a tactical advantage. Furthermore, Lazar has not even established a preliminary showing of prejudicial delay. Thus, his request for an evidentiary hearing is denied.

Accordingly, Lazar has not met the threshold showing for a due process violation. Therefore, his motion is denied.

IT IS SO ORDERED this 6th day of October, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE